

SUPREME COURT. U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 829

AETNA CASUALTY AND SURETY COMPANY, ET AL.,
Petitioners,

vs.

OSBORNE-McMILLAN ELEVATOR COMPANY, INC.,
A CORPORATION,
Respondent.

REPLY OF PETITIONERS.

DONALD N. CLAUSEN,
135 South LaSalle Street,
Chicago, Illinois, 60603,

FRANCIS J. WILCOX,
Union National Bank Building,
Eau Claire, Wisconsin, 54701,

RUDOLPH E. ANDERSON,
218 Telegram Building,
Superior, Wisconsin,
Counsel for Petitioners.

CLAUSEN, HIRSH, MILLER & GORMAN,
135 South LaSalle Street,
Chicago, Illinois, 60603,

WILCOX & WILCOX,
Suite 500,
Union National Bank Building,
Eau Claire, Wisconsin, 54701,

HUGHES, ANDERSON, DAVIS & WITKIN,
218 Telegram Building,
Superior, Wisconsin.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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REPLY OF PETITIONERS.

Reply to Point A:

Respondent agrees that the decisional law of a sister state is to be equated with its statutory law insofar as full faith and credit is involved, thereby conceding the threshold question in the case. It necessarily follows that if this Court agrees with petitioners that Wisconsin denied the validity of Minnesota law, there has been a patent denial of petitioners' constitutional rights, which deprivation can be remedied only by action of this Court.

Reply to Point B:

Petitioners recognize that the doctrine of independent and adequate state grounds may foreclose federal jurisdiction, but such carefully developed doctrine is only applicable where there exists a body of state law sufficient in itself to maintain the judgment even in the face of that court's erroneous application or non-application of federal law. Respondent fails to show that any independent and adequate state ground supporting the result below is present in the case here.

The "independent and adequate state ground" doctrine has been developed to prevent an opinion of the United States Supreme Court from being relegated to the status of an advisory opinion when the state court has available an independent ground of state law which could sustain its judgment regardless of its violation of any federal principle. *Murdock* v. *Memphis;* 20 Wall. 590, 22 L. Ed. 429, 444; 87 U. S. 590 (1874).

If this Honorable Court accepts this case and agrees with the petitioners, the Wisconsin Supreme Court has available no independent state ground upon which it can base a subsequent result contrary to this Honorable Court's decision.

As *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092 (1945) (Respondent's Brf. p. 4), indicates, such an "independent and adequate state ground" would be found, for example, in the state's body of law regarding fraud—even though the state court applied an erroneous view of federal law governing licensing. In *Radio Station WOW, supra,* the state court's decision could be said to rest independently upon the state law of fraud, regardless of the state court's determination regarding federal licensing. Respondent has shown no such independent and adequate state ground here. Indeed, none exists.

Wisconsin, in rendering the decision below, simply predicated the result reached upon its own rationalization (what it called "reading") of *Honeymead;* it made no reference to any independent body of Wisconsin law; and in so doing reached a result plainly at odds with *Honeymead.*

Respondent (Brf. p. 3) describes the activity of the Wisconsin Supreme Court in the second *Osborne* appeal as follows:

> "* * * The Wisconsin Supreme Court assumed the applicability of Minnesota decisional law as expressed in the *Honeymead* case, considered petitioner's intentions as to its meaning, concluded that Minnesota law was the same as the Wisconsin law, and affirmed the judgment of the trial court. * * *"

Irrespective of nomenclature employed, the manifest fact remains that Wisconsin reached a conclusion upon the governing point involved which was opposite to that reached by Minnesota.

Respondent insists that the Wisconsin Supreme Court did not reach the federal question which petitioners raise here. As petitioners have pointed out in their petition (pp. 23-24), it is the result of the activity of the Wisconsin Supreme Court which is the gravamen of petitioners' claim of deprivation of constitutional rights, not the method or pattern of rationalization which led it to such conclusion. It is such *result* which compromises the denial of full faith and credit, the very federal question petitioners raise upon their petition.

Prior to the second *Osborne* decision, petitioners could do no more than advise the Wisconsin Supreme Court that the Minnesota Supreme Court had decided that the essence of an explosion was an internal (active) force suddenly and violently seeking release, rather than any mere sudden release of pressure. Since, concededly, the Wisconsin Supreme Court said it would be governed by Minnesota sub-

stantive law, it was not reasonably foreseeable that Wisconsin would close its eyes to the Minnesota substantive law and conclude, contrary to Minnesota law, that the "explosion" was to be found merely in the sudden release of pressure rather than an active force in motion suddenly and violently seeking release.

No principle of law required petitioners to anticipate that the Wisconsin Supreme Court would suddenly depart from the governing law of the case. Petitioners were not required on the main appeal to admonish the Wisconsin Supreme Court concerning a violation of the Full Faith and Credit Clause not yet committed, a violation which no litigant could reasonably expect; a violation which would be a surprising departure from the self-evident and normal duty of the Wisconsin Supreme Court to respect the Full Faith and Credit Clause. Admittedly, petitioners speedily undertook the first opportunity, after the Wisconsin Supreme Court's diametric shift with respect to the essential concepts of "explosion"—its failure to follow the Full Faith and Credit Clause, to assign this error as the very first point in petitioners' (appellants below) petition for rehearing addressed to that court. See: Petition, pp. 12-13.

As shown in the petition here (p. 12), the *Saunders* doctrine, assures an aggrieved party of a remedy for the protection of his constitutional rights in this Court if an ultimate ruling, as that of the Wisconsin Supreme Court here, is a result not in any way foreshadowed and made at the end of the proceedings when the aggrieved party no longer has any right to add to the record. (*Saunders* v. *Shaw*, 244 U. S. 317, 320; 37 S. Ct. 638; 61 L. Ed. 1163 [1917].)

Reply to Point C:

Petitioners have anticipated and answered this point in their petition. However, all of the cases cited by respondent in support of its Point C are without application.

In support of its statement, made *arguendo*, that the Wisconsin court misinterpreted *Honeymead*, and that such misinterpretation does not constitute denial of full faith and credit, respondent cites numerous cases (Brf. p. 5). However, a brief analysis demonstrates that none of these decisions involved the denial of the validity of decisional or statute law, as is true in the case here.

Respondent suggests to this Court that the failure of the Wisconsin court to follow the principles announced in *Honeymead* was nothing more than a misconstruction or misapplication of such principle. This is not what happened below. The only test to be applied is the effect of the *result* reached by the Wisconsin court. In the case here, if the Minnesota Supreme Court had been confronted with the facts presented to the Wisconsin court in the second *Osborne* appeal, that court, under the *Honeymead* principles, would necessarily have resolved the issues in favor of petitioners here, for there was no evidence of any sudden or violent increase of internal pressure commonly associated with explosion. 146 N. W. 2d 522, 528 (See Petition, p. 6).

Notwithstanding, the Wisconsin Supreme Court resolved the issues against petitioners, thus flying directly in the face of the principles announced in *Honeymead*. No matter what face-saving nomenclature was used by the Wisconsin Supreme Court to describe its judicial activity, it neither misconstrued nor misapplied *Honeymead*. In all real and practical effect, the Court's holding denied the validity of such other decision (*Honeymead*). (See Petition, pp. 23-24.) The Wisconsin court held that an event

to come within the scope of "explosion" did not require a force suddenly set in motion, but required only that a sudden *release* of pressure be present. This is denial of *Honeymead.*

That the Supreme Court of Wisconsin predicated its views upon the essential, but erroneous principle that the "explosion" was to be found in the *release* of pressure rather than in the *creation* thereof (as found in *Honeymead*), is conceded by respondent itself, for in its brief respondent says, p. 7:

> "* * * the Wisconsin Supreme Court said that the element of suddenness related to the release of pressure rather than to its creation. * * *"

This Honorable Court has never precluded review of a case where denial of validity of a sister state's law, rather than construction, was involved. Of course, it would not be difficult to observe this patent difference where State "A", considering a statute of State "B", simply said "the statute is invalid." However, it requires greater study and discernment by a court to observe that the judicial activity of a court, whose result is challenged, is equivalent to an actual denial of the validity of either the decisional law or statute law of a sister state. Careful study of the *Honeymead* decision and the challenged decision of the Wisconsin court in the second *Osborne* case must necessarily lead to the conclusion that Wisconsin has, in fact, denied the validity of Minnesota substantive law.

The rationale behind the *Glenn* principle (Resp. Brf. p. 5) is straightforward. If the Supreme Court assumed jurisdiction when only construction of statute or decisional law was at issue, the question before it would not be whether the decision of the state court constituted a violation of the Full Faith and Credit Clause, but whether the state court's construction of a statute was or was not correct.

Indeed, as petitioners have observed, Petition, p. 24, no decision of this Honorable Court applying the principle announced in these cases, and sometimes referred to as the "*Glenn* principle", has precluded review by this Court where an important federal interest has appeared.

This construction of the *Glenn* principle is borne out by an examination of the major cases following *Glenn*. *Glenn*, itself, 47 U. S. 369, stands for the principle that a court does not deny validity of a statute where it gives such statute the same effect it would receive in the sister state's court. The cases following *Glenn*, relied upon by respondent, generally hold that in the challenged situations the court's activity constitutes mere erroneous construction or misapplication of a statute and not a flat denial of the validity of such statute (or decisional law), as is true in the case here. These cases include *Lloyd* v. *Matthews*, 155 U. S. 222, 227; 15 S. Ct. 70; 39 L. Ed. 128 (1894), and *Western Light Indemnity Co.* v. *Rupp*, 235 U. S. 261, 35 S. Ct. 37, 59 L. Ed. 220 (1914) which stand for the proposition that where there has been no pleading of any particular construction of the sister state law, or in fact, no differing state case law is shown, and the forum state construes the sister state law as if it were local law, there is no denial of validity. *Banholzer* v. *New York Life Ins. Co.*, 178 U. S. 402, 406; 20 S. Ct. 972; 44 L. Ed. 1124 (1900), and *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mint and Mill Co.*, 243 U. S. 93, 96; 37 S. Ct. 344; 61 L. Ed. 610 (1917) are cases of candid construction where the reasoning process of the court being reviewed leaves no doubt that it fairly and accurately interpreted sister state law. *Jackson* v. *New York Life Ins. Co.*, 187 U. S. 491, 495; 23 S. Ct. 194; 47 L. Ed. 273 (1903), and *Allen* v. *Alleghany Co.*, 196 U. S. 458, 465; 25 S. Ct. 311; 49 L. Ed. 551 (1905) are cases where the sister state law is inapplicable by virtue of that very state's law. This is a situation in which there

could be no denial of validity because the sister state's statute could never be seen as determinative.

Federal interest is not shown until a sister state's statute or decisional law is adversely determinative of the issues before the deciding state court and the challenged state court's decision denies the validity of such statute or decisional law by arbitrarily deciding that it will not apply that statute or decisional law, or achieving the same result by saying that the other state really says "Y" when in fact it has said "X". As evident from the petition here, the situation existing in the cases supporting the *Glenn* principle are essentially dissimilar and patently distinguishable from the activity of the Wisconsin Supreme Court in the case at bar.

Reply to Point D:

Petitioners have anticipated respondent's Point D and answered it in the petition, pp. 11-13. It was not reasonably foreseeable that the Wisconsin Supreme Court would deny the validity of the principles announced in Honeymead.

See Petition, pp. 11-13 and this Reply Brief, *ante*, p. 4.

Reply to Point E:

The reasons urged in the petition for the granting of the Writ of Certiorari are sound and valid, and are not effectively challenged by respondent.

Concerning Respondent's Request for the Award of a 10% Penalty:

Respondent, pp. 14-18, seeks a recovery of 10% penalty against the petitioners for alleged delay. The petition here discloses a genuine and complex controversy between the parties; it cannot be reasonably said that this effort to seek further review is merely for delay; nor do the circumstances here make out an "appropriate" case for the awarding of any penalty damages.

All cases cited by respondent and discussed below, which have awarded penalties for delay, disclose unusual and special circumstances establishing that the unsuccessful litigant was utilizing the judicial process merely for the purpose of postponing the day of payment. The case here was a case of first impression in the State of Wisconsin, and, indeed, the *Honeymead* decision was a case of first impression in Minnesota. The issues were both numerous and complex. Certainly, with potentially diverse views on a question of first impression, the issues here were far from settled either in Wisconsin or Minnesota (prior to *Honeymead*). Manifestly, petitioners, plaintiffs below, were entitled to have such complex issues resolved by the courts before being accused of using the judicial process merely for delay. As this Court may well observe from the record of the trial below, and the issues raised upon the appeal, petitioners' efforts to seek further review here are neither frivolous nor without sound foundation. It would be offensive to all principles of justice and to all decisions having any governing application here to award to respondent any amount whatsoever by way of a penalty, just because petitioners here sought relief from what they believe, with sincere conviction, to be a clear violation of their constitutional rights, affecting the most crucial and pivotal aspects of the controversy here. Moreover, none

of the decisions cited by respondent present circumstances bearing any comparison or similarity to the circumstances here.

Respondent relies on Supreme Court Rule 56(4), which allows the Supreme Court to award damages for delay in "appropriate cases". The cases cited by respondent define the term "appropriate cases". It is noteworthy that only five of the fourteen cases cited by respondent deal with state court decisions. The other cases must be seen as the Supreme Court's means of policing the propriety of appeals within the federal court system. A quick survey of the cases cited by respondent indicates how essentially dissimilar the circumstances in those cases are from the circumstances in this case. In *Bohn* v. *Bohn,* 316 U. S. 646, 62 S. Ct. 1279, 86 L. Ed. 1730 (1942), the court found no federal question involved in a situation where a widow over 60 years of age claimed that she was entitled to the exclusive use and occupation of a homestead during her life, as against the other adult heirs of the deceased owner. In *Slaker* v. *O'Connor,* 278 U. S. 188, 49 S. Ct. 158, 73 L. Ed. 258 (1928), damages were awarded where a party appealed to the Supreme Court from a decree not yet final and therefore not appealable. In *Wagner Electric Manufacturing Company* v. *Lyndon,* 262 U. S. 226, 43 S. Ct. 589, 67 L. Ed. 961 (1923), the court awarded damages for delay when it directed dismissal for lack of jurisdiction of a suit instituted in the federal court to enjoin the sheriff from paying over money collected under a judgment of the state court—a maneuver clearly on its face for purposes of delay. In *Southern Railway Co.* v. *Gadd,* 233 U. S. 572, 34 S. Ct. 696, 58 L. Ed. 1099 (1914), the award of damages for delay was allowed, where a party insisted on an interpretation of the F. E. L. A., where the questions presented for decision had already been definitively decided. In *Texas and P. R. Co.* v. *Prater,* 229 U. S. 177, 33 S. Ct.

637, 57 L. Ed. 1139 (1913), the Supreme Court found that no question of law was involved. In *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 33 S. Ct. 80, 57 L. Ed. 140 (1912), the court based its award on the frivolous assertion that there had been fraudulent joinder of parties to prevent removal. In *Nelson* v. *Flint*, 166 U. S. 276, 17 S. Ct. 576, 41 L. Ed. 1002 (1897), evidentiary errors were assigned, which, because such errors were clearly covered by already existing law, could only be seen as frivolous. The same may be said of *Gregory Consolidated Mining Co.* v. *Starr*, 141 U. S. 222, 11 S. Ct. 914, 35 L. Ed. 715 (1891). A whole series of cases, *e.g.*, *Whitney, Prentice, Salton* (sic: *Sutton*), *Kilbourne*, and *Barrow* (cited, Resp. Brief, p. 16) involved situations in which the obligor on a promissory note or bill of exchange had neither paid the amount owing nor prosecuted an appeal, but merely done nothing. Perhaps these are classic cases of delay. Indeed, it is such a classic case of delay, *Whitney*, from which respondent quotes at length (Brief, p. 17). It could hardly be said that petitioners here have "done nothing" in the sense in which nothing was done in these cases. Perhaps *Hall* (Resp. Brf. p. 16) best epitomizes the type of appropriate case in which damages for delay are awarded. Here, a party contended that under the Stamp Act, controlling the number of stamps to be put on a deed in order to represent the dollars of consideration, no title was passed because the value of consideration payable in gold or currency represented by the stamps was only in terms of currency and not in terms of the value of gold, and therefore a larger number of stamps should have been placed upon the deed.

This Honorable Court has plainly limited the application of penalties to cases involving either frivolity of defense or circumstances consistent only with obvious delay when a party has no basis in law or in fact for assigning error to a reviewing court. Even this brief analysis of

the cases relied on by respondent clearly defeats respondent's request for the award of a 10% penalty.

CONCLUSION.

Respondent has presented no cogent or compelling reason or authority for denial of further review in this case.

Petitioners therefore pray that this Honorable Court grant their petition for Writ of Certiorari to the Supreme Court of Wisconsin.

Respectfully submitted,

DONALD N. CLAUSEN,
FRANCIS J. WILCOX,
RUDOLPH E. ANDERSON,
Counsel for Petitioners.

CLAUSEN, HIRSH, MILLER & GORMAN,
135 South LaSalle Street,
Chicago, Illinois, 60603,

WILCOX & WILCOX,
Suite 500,
Union National Bank Building,
Eau Claire, Wisconsin, 54701,

HUGHES, ANDERSON, DAVIS & WITKIN,
218 Telegram Building,
Superior, Wisconsin.

